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## Customs, Trade and Transport Law E-alert

# Government rolls out new legislation with impacts to industry

### Introduction

The new Federal Government has been busy introducing a variety of new legislation. This includes two new Customs amendment Bills and a Tradex amendment Bill all containing provisions which had been before the last Parliament but which had lapsed when the last Federal Parliament was dissolved. In addition the Federal Government has also introduced a new Bill to implement the Montreal Convention on liability for air transport of passengers and cargo. While the Tradex amendment Bill was introduced in late February 2008 and has already been the subject of Parliamentary debate, the new Customs Bills and the Bill to implement the Montreal Convention were only introduced on 20 March 2008.

Some preliminary detail on the Bills is below.

### Customs Bills

The new Bills introduced in 20 March 2008 are the

- *Customs Legislation Amendment (Modernising) Bill 2008*
- *Customs Legislation Amendment (Strengthening Border Controls) Bill 2008.*

The provisions in these Bills largely comprise provisions which were in the Bills which had lapsed when the last Federal Parliament was dissolved.

### ***Customs Legislation Amendment (Modernising) Bill 2008:***

According to the Explanatory Memorandum, the new Bill is intended to cover the following aspects.

- Update the broker licensing provisions to recognise the changing environment, including the contractual arrangements that exist between some brokerages and nominees.

This introduces the concept that a nominee broker will be able to work for more than one licensed corporate broker and formalise the role of the "locum broker". This will create some issues for those employing nominees who work for more than one corporate broker in terms of confidentiality of contacts and information and restraints against trying to take clients between their various employers. It will also be interesting to see if Customs impose any new licensing requirements on nominees who work for more than one broker or on the employing broker.

- Modernise revenue collection provisions in the *Customs Act* and provide an ability to offset refund and drawback entitlements against duty liability.

Put simply this will include provisions to formalise Customs general right to recover customs duty for a period of 4 years in most cases – unless the CEO of Customs believes that the underpayment is due to fraud or evasion in which case Customs has an ability to go beyond 4 years to recover underpaid duty. The provisions will also allow Customs to "set off" any drawback or refund to which an importer is entitled

in relation to any goods against any duty which is also owed in relation to those goods. This could arise in a number of scenarios – for example if Tradex duty is payable due to the incorrect claim of a Tradex Order but the goods were, in fact, exported then Customs could set off the drawback against the duty otherwise payable. Customs were of the view that it had no right at general law for such a set-off. The provisions also establish a new mechanism to allow the registration of “payments under protest” against the corresponding electronic Import Declarations. It is noteworthy that the provisions still impose liability on the “owner” of the goods which is a very broad term which could include service providers such as customs brokers.

- To incorporate necessary amendments resulting from the formal introduction of the “Smartgate” passenger processing system.
- Amend the *Customs Act* to reflect the new certificate of origin requirements for the Singapore – Australia Free Trade Agreement. This will enable a certificate of origin to be used for imports of goods over a period of 2 years as long as an Exporter Declaration is provided for each import of goods entitled to preferential treatment.

The provisions of this Bill will have significant potential impact on those in industry and there will need to be changes to procedure to ensure that they are properly implemented.

### ***Customs Legislation Amendment (Strengthening Border Controls) Bill 2008:***

The general intention of the Bill is said to be to amend the *Customs Act 1901* to strengthen Customs investigation and enforcement capabilities and make other amendments.

More specifically the purpose of the Bill is to amend the *Customs Act* to:

- allow a person to surrender certain prohibited imports that have not been concealed;
- allow for the granting of post-importation permissions for certain prohibited imports;
- allow Infringement Notices to be served for certain offences including importing certain prohibited imports and border security related offences;
- enable Customs officers boarding a ship or aircraft to conduct personal searches for, and take possession of, weapons and evidence of specified offences.

The provisions regarding the importation of certain prohibited imports are intended to create a new regime to give Customs flexibility when dealing with “prohibited imports”. It will not remove the ability to seize prohibited items and prosecute for prohibited imports. However, it will provide alternative mechanisms to deal with certain (presumably low risk) items which are prohibited or for which required licences or permits have not or could not have been secured before importation. Customs will identify the relevant goods by way of regulation.

The new regime provides for a variety of enforcement options. Firstly in relation to the relevant categories of prohibited imports, a person importing them and being questioned in a “customs place” can surrender those imports as long as they have not been “concealed” without further action and the goods are forfeited to Customs. Secondly the importer can surrender the goods to be “detained” by Customs pending the permission being secured and the goods can then be returned. Thirdly, Customs will have the option for serving infringement notices in lieu of prosecution for importing prohibited items.

The Bill sets out what must be contained in such infringement notices, the various options available to those who receive the notices (including the right to seek for the notice to be set aside) and the consequences for paying or not paying the amount set out in the notice. Basically these provisions mirror those introduced by the Trade Modernisation Legislation which gave Customs the option of issuing infringement notices for various statements relating to errors in statements to Customs. This will require the development of a new set of "Guidelines" to set out the considerations which will be considered when deciding whether to exercise the discretion to issue an infringement notice. It should be kept in mind that the regime only sets out alternatives – it still remains open to Customs to seize goods (whether by warrant or otherwise) and prosecute even if it relates to the items.

### Future of both Customs Bills

As stated above, both Bills contain provisions which were in previous Bills. Those Bills had been before Senate Inquiries and both sides of Parliament largely supported the provisions so it could be anticipated that they should pass without much further review and debate. I have spoken on the relevant provisions at the time they were first introduced in various CBFCA Member Forums and also at CBFCA State Conventions. Discussion is included in the current round of CBFCA Member Forums. Those in industry will need to take care to watch the progress of both Bills and ensure that they are ready to implement them and to make clients aware of their provisions.

### Tradex Amendment Bill

The *Tradex Scheme Amendment Bill 2008* was introduced late February 2008 and described as a Bill to "amend the *Tradex Scheme Act 1999* and for related purposes".

According to the Explanatory Memorandum the intentions of the Bill are to implement the Tradex – related recommendations from the Review of the Tradex and Manufacturing in Bond Schemes and four (4) post review proposals but not to implement recommendations relating to the "Manufacturing In Bond" scheme which will require amendments to the Customs Regulations.

This will be effected by "decoupling the *Tradex Act* from the Customs Regulations and to improve administration.

Some aspects worthy of attention are as follows:

- There will be no references to drawback tests or terminology in Tradex provisions.
- There will be no need to comply with drawback regulations or to be in an "Exempt Class" to meet Tradex Regulations.
- All Tradex Orders are subject to new requirements regardless of date of issue.
- The "core criteria" for a person holding a Tradex Order will no longer require them to meet the requirements of the drawback regulations.
- The changes to core criteria apply to goods imported after commencement of the new Act.
- The Secretary of the relevant Department can issue a notice if they believe goods are not being exported. The Secretary will be able to require the provision of the required evidence of export and the Secretary will be able to take action against the Tradex holder.
- The Secretary will have the right to revoke the Tradex Order (even if cannot find the holder of the Tradex Order).

- If a Tradex Order is revoked, the goods are still subject to Act and Tradex tax.
- There is an important shift for prosecutions so that if Tradex duty unpaid, the defendant has the duty to prove that goods exported and that duty is not payable. Change the onus away from the Government proving that the goods were not exported.

### Implementation of the Montreal Convention

The *Civil Aviation Legislation Amendment (1999 Montreal Convention and other measures) Bill 2008* was also introduced into Federal Parliament on 20 March 2008. As some may be aware, Australia is not a party to the Montreal Convention governing liability for international air carriers even though most of our international trading partners are parties to the Montreal Convention. This has meant that liability in Australia has been covered by the previous Warsaw Convention and its various amendments which has created an awkward inconsistency between the use of the two Conventions especially given that the Warsaw Convention uses some out of date terminology. Even though many parties have voluntarily agreed to be bound by the Montreal Convention and our Carriers Liability Act provides for higher liability limits for Australian international carriers than those provided under the Warsaw Convention the inconsistency remains. Having considered the various options, the new Government has resolved to accede to the Montreal Convention. This will have the impact of prescribing new limits for injury or death to passengers or for damage or loss to baggage or air cargo or damage caused by delay in the scheduled arrival of a passenger, baggage and freight which occurs in the course of international air carriage.

The adoption of the Montreal Convention would also provide for a “fifth jurisdiction” in which Australian citizens will have access to Australian courts to pursue claims in relation to flights to which the Montreal Convention applies.

These limits of course do not apply to all liability for acts deemed willful or deliberate. The legislation will allow for the limits to increase automatically as the limits are increased under the Montreal Convention. This will require parties involved in international carriage of persons or cargo into Australia and to consider their insurance cover and trading conditions.

It should be noted that our regime relating to purely domestic carriage under the *Carriers Liability Act* and the associated state legislation operates independently of Australia’s obligations under international law.

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